No. 80-599

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

GARLAND P. JEFFERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether Petitioner, with little formal education and untrained in law, was denied effective assistance of counsel and due process of law where (A) his lawyer represented nine other persons in complex criminal conspiracy (21 USC §846) and continuing criminal enterprise (21 USC §848) cases arising out of the same transactions, (B) the interests of the other nine persons represented were not the same as Petitioner, (C) the District Court failed to inquire with respect to the joint representation, and Petitioner's lawyer failed to advise the court of potential prejudice and (D) Petitioner suffered actual prejudice as a result of the multiple representation, *viz,* the lawyer's waiver of his fundamental constitutional right against double jeopardy.

(2) Whether Petitioner's lawyer, by opposing trial together of a greater offense with a lesser included offense as a perceived tactical decision on behalf of numerous defendants whom he also represented in the same case, could effect waiver of Petitioner's fundamental constitutional right against double jeopardy, without a record of Petitioner's voluntary, knowing, and intelligent acquiescence.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Citations to Courts Below	1
Jurisdiction	1
Constitutional Provisions, Etc., Involved	2
Statement of Case	2
Reasons for Allowing the Writ	5
Conclusion	9
Appendix—	
A—Decision of the Seventh Circuit Court of Appeals	App. 1
B—Decision of the United States District Court, Northern District of Indiana	App. 6
C—Order denying Petition for Rehearing, June 3, 1980	App. 16
D—ABA Standards on Defense Function (2d Ed.) Section 3.5	App. 17
E—Rule 44 (c), *Fed. R. Crim. P.*	App. 17

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AUTHORITIES CITED

Cases

	PAGE
Benton v. Maryland, 395 U.S. 784 (1969)	8
Glasser v. United States, 315 U.S. 60 (1942)	6
Holloway v. Arkansas, 435 U.S. 475 (1979)	6
Jeffers v. United States, 532 F.2d 1101 (7th Cir. 1976), *aff'd in part, vac. in part,* 432 U.S. 137 (1977)	3, 6
Johnson v. Zerbst, 304 U.S. 458 (1938)	8
Simmons v. United States, 390 U.S. 377 (1977)	8
United States v. Martorano, 610 F2d 36 (1st Cir. 1979)	5
United States v. Mavrick, 601 F2d 921 (7th Cir. 1978)	5
United States v. Medina-Herrera, 606 F2d 770 (7th Cir. 1979)	5

Rule

Rule 44 (c), *Fed.R.Crimi.P.*	5

Other Authorities

ABA Standards, Defense Function §3.5	5
Fifth Amendment to United States Constitution	7

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CITATIONS TO COURTS BELOW

The decision of the Seventh Circuit Court of Appeals is unreported and is Exhibit A in the Appendix. The decision of the United States District Court, Northern District of Indiana is unreported and is Exhibit B in the Appendix.

JURISDICTION

Jurisdiction is proper in this Court pursuant to 28 USC § 1254 (1). The judgment of the Seventh Circuit Court of Appeals was entered on June 3, 1980. Petitioner's petition for rehearing was denied on August 12, 1980.

CONSTITUTIONAL PROVISIONS, ETC. INVOLVED

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Fifth Amendment, U.S. Constitution:

> "No person shall . . . be deprived of life, liberty or property without due process of law."

American Bar Association Standards on Defense Function (2d Ed.) Section 3.5. (The text is reprinted in Appendix as Exhibit D)

Rule 44 (c), *Fed. R. Crim. P.* (The text is reprinted in Appendix as Exhibit E)

STATEMENT OF CASE

On March 18, 1974, Petitioner Garland Jeffers was charged in a one-count indictment with conspiracy to distribute heroin and cocaine in alleged violation of 21 USC § 846. Nine other persons were also indicted with Jeffers as co-conspirators. All were represented by the same lawyer.

On the same date, Jeffers alone was charged in a second indictment with continuing criminal enterprise in alleged violation of 21 USC § 848. Jeffers was represented by the same lawyer who represented all defendants (including Jeffers) in the conspiracy case.

The District Court failed to raise any issue of potential prejudice to Jeffers arising out of multiple representation. Jeffers' counsel failed to raise any potential prejudice before the District Court. Jeffers has little formal education, commencing time in reformatories during grade school, and he is untrained in law.

Prior to trial in the conspiracy case, the Government moved for trial together of (a) the conspiracy charge against all defendants and (b) the continuing criminal enterprise charges against Jeffers alone. The lawyer for all defendants (including Jeffers) opposed consolidation on the ground that all defendants would be prejudiced by the jury's consideration of the continuing criminal enterprise charge with the conspiracy charge. Jeffers was not consulted concerning the motion, and was not advised of the implications of such opposition to him personally. The District Court refused to consolidate the cases. Jeffers was then convicted by a jury of the conspiracy charge, and he was sentenced to fifteen years imprisonment, three years special parole term, and a fine of $25,000.

Prior to trial on the continuing criminal enterprise charge, Jeffers moved (through new appointed counsel representing Jeffers alone) to dismiss the indictment on double jeopardy grounds, alleging that his prior conviction on the conspiracy charge precluded his prosecution on the continuing criminal enterprise charge. The District Court denied the motion. Jeffers was then convicted by a jury of the continuing criminal enterprise charge. He was sentenced to life imprisonment, and a fine of $100,000.

The Seventh Circuit Court of Appeals affirmed. (532 F2d 1101 (7th Cir. 1976)). This Court granted certiorari, and affirmed in part and vacated in part. (432 US 137 (1977)). In ruling on the double jeopardy issue, this Court held that trial together of the conspiracy and continuing criminal enterprise charges could have taken place without undue prejudice to Jeffers' Sixth Amendment right to a fair trial, since if the charges had been tried in one proceeding, a lesser included offense instruction could have been given, the refusal of which instruction could have

been preserved by proper objection. This Court, attributing the waiver effected by the lawyer to Jeffers, concluded that this course of action should have been followed by Jeffers, and that his action in opposing consolidation deprived him of any right he might have had under the double jeopardy clause against consecutive trials.

On October 21, 1977, Jeffers filed a motion under 28 USC § 2255 raising assistance of counsel and fair trial issues. On December 5, 1978, the District Court denied the petition without hearing. On June 3, 1980, the Seventh Circuit Court of Appeals affirmed. On August 12, 1980, Jeffers' petition for rehearing was denied.

REASONS FOR ALLOWING THE WRIT

1. This case presents a situation where a criminal defendant, having little formal education and untrained in the law, suffered actual prejudice as a result of his lawyer's decision to represent Petitioner and nine other persons in complex conspiracy and continuing criminal enterprise charges brought by the Government under 21 USC §§ 846 and 848.*

2. The decision of the Seventh Circuit Court of Appeals in this case, and in *United States* v. *Medina-Herrera,* 606 F2d 770 (7th Cir. 1979) and *United States* v. *Mavrick,* 601 F2d 921 (7th Cir. 1978) are directly in conflict with the decision of the First Circuit Court of Appeals in *United States* v. *Martorano,* 610 F2d 36 (1st Cir. 1979), concerning whether a defendant jointly represented must be personally advised by the court of his right to effective assistance of counsel, including separate representation.

3. The decision of the Seventh Circuit Court of Appeals in this case is directly in conflict with proposed Rule 44 (c), *Fed. R. Crim. P.*, which requires that in every common representation situation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to effective assistance of counsel, including separate representation."

4. The decision of the Seventh Circuit Court of Appeals in this case is directly in conflict with American Bar Association Standards on Defense Function, § 3.5 concerning multiple representation.

5. The decision of the Seventh Circuit Court of Appeals in this case conflicts with previous decisions of this

* The case does not involve any claim of *per se* prejudice arising from multiple representation. The case does not involve prior issues raised or decided by the Seventh Circuit Court of Appeals or this Court, either on direct appeal or in any collateral proceeding.

Court concerning multiple representation. *E.g., Glasser* v. *United States,* 315 U.S. 60 (1942); *Holloway* v. *Arkansas,* 435 U.S. 475 (1979). This is not a case involving a contention that multiple representation is *per se* violative of constitutional guarantees of effective assistance of counsel, but a case where Petitioner suffered actual prejudice as a result of common representation.

6. The potential prejudice to a criminal defendant in being represented by a lawyer who also represents numerous co-defendants was realized here. Jeffers had little formal education, and was untrained in law. His lawyer undertook representation of nine other persons, in addition to Jeffers, in two complex criminal cases arising out of the same transactions. His lawyer failed to advise the court of any potential prejudice arising out of the multiple representation. The court failed to make any inquiry concerning the joint representation, and failed to personally advise Petitioner of his right to separate representation.

7. Jeffers suffered actual prejudice as a result of common representation, his lawyer failing to protect a fundamental constitutional right. His lawyer, in opposing consolidation of the continuing criminal enterprise charge (which related to Jeffers alone) with the conspiracy charge (which related to ten persons, including Jeffers), did so having in mind the interest of the nine other persons he represented in the conspiracy case, who would be prejudiced by trial of the continuing criminal enterprise charge with the conspiracy charge.* In short, the interests of

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* "When the Government attempted to obtain a joint trial on all the charges against all the defendants, the attorney representing all the Defendants resisted the Government motion. He did so largely because of the possible prejudice to petitioner's codefendants, and gave relatively little emphasis to arguments relating to petitioner alone." (Dissent, *Jeffers* v. *United States,* 432 U.S. 137 (1977), Fn.4)

those nine persons, and the interests of Jeffers were not the same. The interest of Jeffers demanded that he not participate in opposition to consolidation, and permit all other defendants in the conspiracy case to oppose consolidation. In order to take this course, the interest of Jeffers in maintaining the procedural position created by the Government in indicting separately should have been asserted.* The decision was not made, and could not have been made, due to the common representation and obvious inability of one lawyer to effectively consider the paramount interests of each of his clients. This Court, moreover, should not be forced to speculate concerning the harm accruing to Jeffers from this fundamental error. In fact, Jeffers suffered actual prejudice, *viz,* waiver of his fundamental constitutional right against double jeopardy, a right which would have been preserved but for the actions of his lawyer arising out of multiple representation. This does not merely involve "tactical" action which operated to Jeffers' disadvantage.

8. Moreover, Jeffers' lawyer, by opposing a motion to consolidate a greater offense with a lesser included offense as a perceived tactical decision on behalf of numerous defendants whom he also represented in the same case, could not thereby effect a waiver of Jeffers' fundamental constitutional right against double jeopardy, without a record of his voluntary, knowing and intelligent acquiescence. The guarantee against double jeopardy contained in the Fifth Amendment, U.S. Constitution, is a fundamental right.

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* It is extremely significant that shortly after Jeffers obtained separate appointed counsel, a motion was immediately filed in his behalf which recognized the lesser offense-greater offense issue, and the double jeopardy issues created by the Governments' choice of separate indictments.

E.g., Benton v. *Maryland,* 395 U.S. 784 (1969). Fundamental constitutional rights, such as the double jeopardy guarantee, can be waived, but only by a defendant acting knowingly, voluntarily and intelligently. *E.g., Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

9. The waiver issue presented here was not previously decided by the Seventh Circuit Court of Appeals, or by this Court. Four members of this Court, in ruling on the double jeopardy issue, considered a different waiver issue, *viz,* surrender of one constitutional right in order to assert another. *E.g., Simmons* v. *United States,* 390 U.S. 377 (1977).

10. The Seventh Circuit Court of Appeals here incorrectly assumed that Petitioner himself "retained primary control" of the choice in opposing consolidation. There is nothing in the record to support that assumption. (See Appendix A, p. 2)

11. The Seventh Circuit Court of Appeals here also incorrectly assumed that "an allegedly detrimental decision was made upon considerations which would have influenced even wholly independent counsel." In fact, when Petitioner obtained wholly independent counsel, the detrimental decision was immediately recognized. (See Appendix A, p. 5)

12. The District Court failed to consider the multiple representation issue raised here (see Appendix B). The issue presented here differs from previous ineffective assistance of counsel issues presented by Jeffers in the District Court and in the Seventh Circuit Court of Appeals.*

* The Seventh Circuit Court of Appeals is obviously wrong. "when it states that solely because Petitioner has raised previous ineffective assistance issues (on other grounds), the District Court properly concluded it was not required to consider the issue raised here. (App. 4)"

CONCLUSION

For all of the foregoing reasons, Petitioner Garland P. Jeffers respectfully asks that this Honorable Court grant his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 3, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Submitted: April 15, 1980)*
June 3, 1980.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1027 vs.

GARLAND P. JEFFERS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
Nos. H Cr 74-56, H Cr 74-57
Allen Sharp, *Judge*.

ORDER

On October 20, 1977, Jeffers filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. The *pro se* petition

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively decided that oral argument was unnecessary. The notice provided that any party could file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 14(f). The appellant has filed such a statement. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and the record.

and supporting memorandum challenged the finding that Jeffers "waived" his protection against double jeopardy, and alleged that he had been denied effective assistance of counsel. The motion was denied without a hearing. For the reasons given below, we affirm.[1]

Although in the district court he challenged the finding that he "waived" his protection against Double Jeopardy on several grounds, in this court Jeffers argues only that his attorney's opposition to the Government's motion to consolidate greater and lesser included offenses in one proceeding did not effect a waiver of Jeffers' constitutional protection against Double Jeopardy, absent Jeffers' voluntary, knowing, and intelligent acquiescense. The Government responds that this claim implicitly was rejected by the Supreme Court on direct appeal and, therefore, may not be relitigated in a § 2255 proceeding.

The short answer to both parties is that the permissibility of Jeffers' second trial does not depend on his knowing, voluntary and intelligent waiver. The determinative consideration is whether Jeffers retained primary control over the course to be followed after the Government moved for a trial together. *Cf. United States* v. *Dinitz,* 424 U.S. 600, 609, n.11 (1976). On direct appeal, a Supreme Court plurality believed that in this case, as in *Dinitz,* Jeffers was "solely responsible for the successive prosecutions [and, therefore, was] deprived of any right that he might have had against consecutive trials." *Jeffers* v. *United States,* 432 U.S. 137, 154 (1977). We agree. Moreover, because a majority of the Court rejected Jeffers' claim

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[1] The lengthy procedural history of this case is adequately recited in the district court's memorandum and need not be repeated here. *See Jeffers* v. *United States,* 461 F. Supp. 300, 301-03 (N.D. Ind. 1978).

that his second conviction was barred by Double Jeopardy,[2] he was properly foreclosed from relitigating that claim. *Cf. Sanders* v. *United States,* 373 U.S. 1 (1963); *See Davis* v. *United States,* 417 U.S. 333, 342-47 1974); *Kaufman* v. *United States,* 394 U.S. 217, 227, n.8 (1969); *Wiley* v. *Daggett,* 551 F.2d 776, 777, n.3 (8th Cir.) *cert. denied,* 434 U.S. 844 (1977); *Boecknhaupt* v. *United States,* 537 F.2d 1182 (4th Cir.); *cert. denied,* 429 U.S. 863 (1976); *Webb* v. *United States,* 510 F.2d 1097 (5th Cir. 1975); *Pantico* v. *United States,* 412 F.2d 1151 (2d Cir. 1969), *cert. denied,* 397 U.S. 921 (1970).

Jeffers' contention that he was denied effective assistance of counsel is an attack upon the representation he received during his first trial insofar as it affected his Double Jeopardy claim. Utilizing 20/20 hindsight, Jeffers now contends that his attorney was unconstitutionally deficient because he failed to elect the procedure which the Supreme Court plurality suggested he should have followed. 432 U.S., at 153, n.21. Jeffers contends that his attorney failed to do so because his loyalty was divided.

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[2] As discussed above, the Supreme Court plurality explicitly rejected Jeffers' Double Jeopardy claim. Justice White's terse concurrence is less clear. It may be read as an acceptance of this court's ruling that Jeffers' second trial was not barred because *Ianelli* v. *United States,* 420 U.S. 770 (1975), created an exception to the normal Double Jeopardy analysis for complex statutory crimes. 432 U.S., at 158; 532 F.2d 1101, 1108 (7th Cir. 1976). It is more likely that Justice White accepted the plurality's view that *Ianelli,* rather than being constitutionally based, was decided as a matter of federal criminal law. *See* 432 U.S., at 146; *Ianelli, supra,* at 782, 785, n.17, but believed that the two offenses of which Jeffers was convicted were different under *Ianelli.* In either case, Justice White necessarily rejected Jeffers' Double Jeopardy claim because, of course, the law requires that convictions barred by Double Jeopardy must be reversed, and he voted to affirm Jeffers' second conviction. Remarks in the dissent support this reading of the concurrence. *See* 432 U.S., at 160, n.7.

This is Jeffers third attack upon his original trial counsel. On direct appeal from his first conviction this court rejected Jeffers' argument that his counsel's failure to conduct a thorough cross-examination, because of an alleged conflict of interests stemming from his firm's prior representation of the witness, required a reversal of the conviction. 520 F.2d, at 1262-1266. In affirming the district court's denial of a subsequent § 2255 motion, this court held that Jeffers' attorney was not unconstitutionally ineffective because of the alleged incomplete cross-examination and because he failed to discover the identity of Government witnesses. No. 76-1532 (November 24, 1976). Therefore, the district court properly concluded that it was not required to entertain the instant attack upon Jeffers' original trial counsel. *See Sanders, supra.*

Moreover, Jeffers claim is simply untenable. Common representation itself is not a violation of the sixth amendment. *United States* v. *Mandell,* 525 F.2d 671 (7th Cir. 1975), *cert. denied,* 423 U.S. 1049 (1976). Where, as here, an allegedly detrimental decision was made upon considerations which would have influenced even wholly independent counsel, the defendant has not been denied effective assistance of counsel simply because his attorney represented multiple defendants. *See, e.g., English* v. *United States,* No. 79-1817 (7th Cir. March 13, 1980). It is much too easy at this point to criticize the decision to oppose the Government's motion to consolidate the two charges, however, that decision must be put in perspective. The basis of the opposition to consolidation was the contention that the two offenses were different. 432 U.S., at 144, n.8. To this day, the correctness of this contention has not been determined definitively. 432 U.S., at 150, n.15. Therefore, while it may now appear that a better course of action was

open to him, we cannot say that the action which Jeffers' attorney took fell below "a minimum standard of professional representation." *United States ex rel. Williams* v. *Twomey,* 510 F.2d 634, 641 (7th Cir.), *cert. denied sub-nom., Sielaff* v. *Williams,* 423 U.S. 876 (1975).

Accordingly, the order of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARLAND JEFFERS

Plaintiff

v. No. H 77-372

UNITED STATES OF AMERICA

Defendant

MEMORANDUM AND ORDER

On March 18, 1974, the Petitioner, Garland P. Jeffers, and 12 other individuals were charged in a one-count indictment in the United States District Court for the Northern District of Indiana under Cause Number H Cr 74-56 with conspiring over a two and a half year period to distribute heroin and cocaine in violation of Title 21, United States Code, Section 846. On that date, the Petitioner was also separately indicted under Cause Number H Cr 74-57 for having engaged during the same period in a continuing criminal narcotics enterprise, in violation of Title 21, United States Code, Section 848. The United States sought to consolidate the indictments for purposes of trial. The Petitioner at that time objected to consolidation on the grounds, among others, that the two offenses were not the same and that consolidation would be prejudicial. The District Court denied the Government's motion and ordered that the charges be tried separately.

In June 1974, after a jury trial, the Petitioner and six co-defendants were convicted as charged under the conspiracy indictment. The Petitioner was sentenced to fifteen years imprisonment, three years special parole term and a fine of $25,000.00. From that conviction and sentence, the Petitioner filed a direct appeal.

The principal question raised upon direct appeal by the attorneys who had acted as trial counsel was whether the failure of the defense counsel to conduct a thorough cross-examination of a former client who testified as a prosecution witness required reversal of that conviction, challenging as specific error the refusal of the Court to grant a motion to withdraw made by counsel because of a purported inability to cross-examine government witness, James Berry, because of an alleged conflict of interest resulting from that prior representation. The Seventh Circuit Court of Appeals affirmed, United States v. Jeffers, 520 F. 2d 1256 (7th Cir. 1975), and the Supreme Court of the United States denied a Petition for Writ of Certiorari, Jeffers v. United States, 423 U.S. 1066 (1975).

The Petitioner, Garland P. Jeffers, and his co-defendants subsequently filed a motion pursuant to Title 28, United States Code, Section 2255 to set aside their convictions in that case on the principal ground of ineffective assistance of counsel. The District Court denied the Motion and the Court of Appeals affirmed (United States Court of Appeals for the Seventh Circuit Number 76-1532, unpublished opinion dated November 24, 1976) (See Appendix A). Petition for Writ of Certiorari was denied from that decision by the Supreme Court of the United States, Number 76-5974, court order dated March 21, 1977. In the first § 2255 Motion filed under that cause, the Petitioner and his co-defendants took a clue from the original appellate decision and attempted to charge their trial counsel with ineffective as-

sistance of counsel. In view of the new allegations that are now made it is important to note the portion of the unpublished order of the Seventh Circuit in their review of the denial of the first § 2255 Motion:

> "It is important to note, also, that when this Court said that: 'Misjudged his ethical responsibilities,' *id.* at 1266, it was not saying that: was an 'ineffective' counsel. Cohen's decision was based upon sound tactical reasons and although in hindsight it may have been an unwise strategy, it did not result in prejudicial error. Moreover, this Court stated elsewhere that the mere fact that 'an attorney is unable to pursue one line of inquiry does not mean, however, that the Defendant is receiving inadequate representation' *id.* at 1265, and that it found Cohen's 'competence unchallenged and . . . demonstrated by the record' *id.* at 1263." *Garland Jeffers* v. *United States of America,* United States Court of Appeals for the Seventh Circuit, Number 76-1532, unpublished opinion at p. 3 (November 24, 1976)

In March 1975, after another jury trial, the Petitioner was convicted as charged under the continuing criminal enterprise indictment in Cause Number H Cr 75-57. Prior to that second trial, Jeffers, through his new court-appointed counsel, filed a Motion to Dismiss the continuing criminal enterprise indictment on the grounds that it was barred by his conviction on the lesser included charge of conspiracy to distribute narcotics. The District Court denied that motion and the United States Court of Appeals for the Seventh Circuit affirmed, *United States* v. *Jeffers,* 532 F. 2d 1101 (7th Cir. 1976), holding that while double jeopardy would have attached under traditional rules, *Iannelli* v. *United States,* 420 U.S. 770 (1975), created a new exception. The Seventh Circuit held that *Iannelli* had established a "new double jeopardy approach towards complex statutory crimes", an approach that, in the

Court's view, disregards earlier tests for identity of offenses and focuses instead on whether Congress intended the statutes in question to prohibit and punish different types of conduct. It concluded that under this new approach the second prosecution was permitted.

Jeffers then petitioned the Supreme Court of the United States for Writ of Certiorari which was granted by the Court, 429 U.S. 815 (1976). Although the Petitioner's Brief on Writ of Certiorari was unavailable to the United States Attorney at the time of this writing, it is clear from the Brief of the Soliciter General of the United States that Petitioner alternatively argued to the Supreme Court of the United States that he did not knowingly waive his double jeopardy rights under the standard enunciated in Johnson v. Zerbst, 304 U.S. 458 (1938).

The Supreme Court of the United States held in part:

> "If the Defendant expressly asks for separate trials on the greater and lesser offenses, or, in conjunction with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown Rule [of double jeopardy] emerges . . . in this case, trial together of the conspiracy and continuing criminal enterprise charges could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial. . . . Nevertheless, petitioner did not adopt that course. Instead, *he was solely responsible for the successive prosecutions* for the conspiracy offense and the continuing criminal enterprise offense. Under the circumstances, we hold that his action deprived him of any right that he might have had against consecutive trials. It follows, therefore, that the Government was entitled to prosecute petitioner for the § 848 offense . . ." *Jeffers* v. *United States,* 97 S. Ct. 2207 at 2217-18 (1977) (cases omitted; emphasis added)

On October 21, 1977, the Petitioner filed this motion under § 2255, Title 28 of the United States Code, to collaterally attack his convictions in the United States District Court for the Northern District of Indiana.

The Petitioner now seeks by this § 2255 Motion to challenge the waiver by claiming a denial of effective assistance of counsel. Additionally, he claims that by the alleged failure of the District Court and the Prosecutor to "discharge and perform their respective duties" in failing to advise him of the impact of his action in requesting separate trials upon his constitutional rights denied him a fair trial as guaranteed under the Constitution.

Under § 2255, Title 28 of the United States Code, a federal prisoner may seek habeas corpus relief on three specific grounds: that his sentence violates the Constitution, laws or treaties of the United States, that the Court lacked jurisdiction to impose sentence, or that the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255 (1970); see, *Davis* v. *United States,* 417 U.S. 333, 343 (1974); *United States* v. *Hayman,* 342 U.S. 205, 219 (1952). The Petitioner raises neither of the two latter grounds. Rather, he attempts to claim a violation of his constitutional right to double jeopardy and to a fair trial, the latter complaint being a tortured construction of alleged error into constitutional proportions.

A motion to vacate a sentence under this section relating to collateral attack on federal convictions was not intended to broaden or narrow the scope of collateral attack available to a petitioner prior to the enactment of this section through Writs of Quorum Novis (sic) and Habeas Corpus. *United States* v. *McNicholas,* 298 F. 2d 914 (4th Cir. 1962), cert. den. 369 U.S. 878 (1962). This section does not provide routine review of the convictions and sentences at the whim of a prisoner who is dissatisfied with

his sentence but is available only in the extraordinary and unusual case. *Smith* v. *United States,* 277 F. 2d 850 (Md. D. Ct. 1967), aff'd 401 F. 2d 773. These principles are directly applicable to his claims directed to the claimed inaction of the District Court and the Prosecutor providing the basis for grounds two and three of his petition.

In summary, the Petitioner claims that both the Court and the Prosecutor were obliged to advise him of the impact of the decision to oppose the Motion for Joinder of causes for the purposes of trial as constituting a waiver of his right against double jeopardy. Presupposing such a duty to be imposed upon the District Court and the Prosecutor, it is only when there has been a denial of the substance of a fair trial that the validity of the proceedings may be collaterally attacked or questioned by a motion under the statutory review proceeding by a prisoner in federal custody. *United States* v. *Re,* 372 F. 2d 641 (2d Cir. 1967), cert. den. 388 U.S. 912. Anything less than a matter so inherently prejudicial as to constitute a subversion of a fair trial would ordinarily represent a general trial instant, required to be challenged in proceedings on direct appeal from the conviction rather than by a Motion to Vacate the Sentence, *Ellis* v. *United States,* 353 F. 2d 402 (8th Cir. 1965). The Petitioner does not attack the substance of the trial following which he was convicted of engaging in a criminal narcotics enterprise, let alone any action or course of conduct during the trial itself as being inherently prejudicial. Rather the Petitioner claims that he should not have been subjected to a second trial at all. Thus, his claim of error fails to fall within the constitutional rights he has sought to articulate with respect to the claimed inaction by the District Court or the Prosecutor.

The unpublished order of the Seventh Circuit on a prior § 2255 Motion of this Petitioner (Appendix A) provides guidance disposition of this claim:

> "Petitioners' suggestion that the trial judge should have made a record that they 'waived' their right to effective counsel at that point in the trial where the alleged 'conflict' situation arose is ludicrous. To force such an affirmative duty on a judge would result in his constantly interrupting the progress of a trial at each and every junction of a tactical decision." See Appendix A at pp. 4-5.

Such unpublished order is a part of the law of this case.

Moreover, the Supreme Court of the United States disposed of this claim as to the duties of the District Court and the Prosecutory in their opinion on the direct appeal of this matter.

> "Footnote 22. Petitioner's position is not strengthened merely because no one raised the multiple prosecution point during the first proceeding. Since the Government's posture throughout this case has been that § 846 and § 848 are separate offenses, it could not have been expected on its own to elect between them when its Motion for Trial Together was denied. The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention." *Jeffers* v. *United States,* 97 S. Ct. 2207 at 2218 (1977).

Thus, not only has the issue now raised by the Defendant as to the Prosecutor and the District Court been resolved by an earlier decision in this matter and thus barred by principles of res judicata, the opinion of the Supreme Court establishes that the law is adverse to the Petitioner on this point.

The crux of the Petitioner's complaint is directed to the question of whether he received effective assistance of counsel, which in turn is based upon his claim that he did not personally intelligently, knowingly and voluntarily

waive his double jeopardy rights. Both aspects of the issue he raises have been previously litigated. As indicated in the Statement of Facts, Jeffers has already attacked the competency of his trial counsel on a prior § 2255 Motion attacking his conviction under Hammond Criminal Number 74-56. As indicated by the quoted language, the Seventh Circuit Court of Appeals found the trial counsel, Mr. Max Cohen, to be both competent and effective in all respects, an opinion based upon the record of the entire proceedings, not affected by perhaps "tactical mistakes".

Secondly, the Supreme Court implicitly disposed of his argument founded upon the principles enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458. Although the Supreme Court's opinion does not explicitly state that they found the action of defense counsel directly attributable to the Petitioner, thus binding him to the tactical decision made by defense counsel, the Supreme Court did have before it this argument by the Defendant and the Government when it held "he was solely responsible for the successive prosecutions". *Jeffers,* at 2218.

While the doctrine of res judicata is not applicable to motions under § 2255, *Bennett* v. *United States,* 413 F. 2d 237 (7th Cir. 1969), the Supreme Court in *Sanders* v. *United States,* 385 U.S. 1, 10 (1963), has formulated basic rules to guide the lower federal courts in their interpretation of the statutory provision that the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner. The Court held in *Sanders* that controlling weight may be given to denial of a prior application for § 2255 relief if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served

by reaching the merits of the subsequent application. Thus in *DeWelles* v. *United States,* 372 F. 2d 67 (7th Cir. 1967, cert. den. 388 U.S. 919, the Court of Appeals for this Circuit held that relitigation of the issues presented at trial and on direct appeal, go under different labels or on expanded allegations that could have been made in the first instance, were not contemplated by § 2255. In that case the Seventh Circuit held that the Petitioner's prior claim on direct appeal that substituted counsel was not permitted sufficient time for the preparation of defense though a timely request for a continuance of the trial date was made, his subsequent claim on a § 2255 Motion that he was denied effective assistance of counsel were found to be the same and held that the District Court properly denied relief without affording the prisoner an evidentiary hearing. See, *DeMaro* v. *Willingham,* 401 F. 2d 105 (7th Cir. 1968). Likewise, the Seventh Circuit held in *Bennett* v. *United States,* 413 F. 2d 237 (7th Cir. 1969), cert. den. 397 U.S. 996, that where a Petitioner's contentions were contained in a prior § 2255 Motion which was denied and that decision became final, the District Court was correct in refusing to rule upon those contentions in a later § 2255 Motion. But see, *Hilbrich* v. *United States,* 406 F. 2d 850 (7th Cir. 1969), cert. den. 396 U.S. 936, where, although an earlier § 2255 Motion sought relief on the ground that the Petitioner's confession was obtained in violation of his constitutional rights, but on substantially different factual bases, of consideration of the merits of the petition must be made by the District Court.

The Petitioner having failed to carry forth his burden to show that the end of justice would be served by redetermination of this ground, *Sanders* v. *United States, supra,* it is within the power of this Court to deny this Petitioner's § 2255 Motion without a hearing. See, *Stephens* v. *United States,* 341 F. 2d 100 (10th Cir. 1965).

In *United States* v. *Dinitz,* 96 S. Ct. 1075 (1976), it states:

> "The Respondent characterizes a Defendant's Mistrial Motion as a waiver of 'his right not to be placed twice in jeopardy' and argues that to be valid the waiver must meet the knowing, intelligent and voluntary standards set forth in *Johnson* v. *Zerbst.* This approach erroneously treats the Defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the Constitutional prohibition against double jeopardy may be served by a mistrial declaration and comitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention. . . ." *United States* v. *Dinitz, supra,* at 1081, fn. 11 (cites omitted).

In other words, unlike the right to counsel and other constitutional rights to which the *Johnson* v. *Zerbst* standard is applicable, the right to double jeopardy may be waived by defense counsel without inquiry of the defendant himself because other interests—i.e., the right of society—must be given consideration at the effective time of the waiver. Even if the *Johnson* v. *Zerbst* standard were otherwise applicable in double jeopardy cases, Petitioner's deliberate, tactical decision to oppose a single trial on both indictments would preclude him from invoking it. See, *Henry* v. *Mississippi,* 379 U.S. 443, 450-453.

On the basis of the foregoing, the Petitioner's request that this Court vacate and set aside all proceedings had in Cause Number H Cr 74-57 and order Jeffers released from all strain of said conviction be in all things denied without recourse to evidentiary hearing. So Ordered.
Enter December 5, 1978.

/s/ Allen Sharp
Judge, United States District Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 12, 1980.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1027 vs.

GARLAND P. JEFFERS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
Nos. H Cr 74-56, H Cr 74-57
Allen Sharp, *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause by Garland P. Jeffers, defendant-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX D

American Bar Association Standards on Defense Function, § 3.5(b)

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

APPENDIX E

Rule 44(c), *Fed.R.Crim.P.*:

"(c) *Joint representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

No. 80-599

Supreme Court, U.S.
FILED
DEC 5 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

GARLAND P. JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the joint representation of petitioner and his co-defendants by the same attorney denied petitioner the effective assistance of counsel.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Cuyler v. *Sullivan*, No. 78-1832 (May 12, 1980)	5, 7
Holloway v. *Arkansas*, 435 U.S. 475	4
Iannelli v. *United States*, 420 U.S. 770	3
Johnson v. *Zerbst*, 304 U.S. 458	7
United States v. *Dinitz*, 424 U.S. 600	7
United States v. *Martorano*, 610 F.2d 36	5

Constitution, statutes and rule:

United States Constitution:

Fifth Amendment (Double Jeopardy Clause)	3
Sixth Amendment	4
21 U.S.C. 846	1, 2, 3
21 U.S.C. 848	1, 3, 8
28 U.S.C. 2255	1, 2, 3
Fed. R. Crim. P. 44(c), Pub. L. No. 95-42, 93 Stat. 326	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1980. A petition for rehearing was denied on August 12, 1980. The petition for a writ of certiorari was filed on October 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of engaging in a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. He was sentenced to life imprisonment and fined $100,000. The court of appeals affirmed, 532 F.2d 1101 (1976). This Court granted certiorari, affirmed the judgment in part, and vacated it in part. 432 U.S. 137 (1977). Petitioner thereafter filed the instant motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

1. On March 18, 1974, petitioner and nine other individuals were charged in a one count indictment with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846. A second indictment charged petitioner alone with conducting a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. The government thereafter filed a motion

to consolidate the indictments for trial. Petitioner and his nine co-defendants in the conspiracy case, through their common counsel, filed a joint objection to the government's motion. The district court denied the government's motion and ordered that the charges be tried separately. In the ensuing trial of the Section 846 charge, petitioner and six of his co-defendants were convicted of conspiracy. The court of appeals affirmed petitioner's conviction, 520 F.2d 1256 (7th Cir. 1975), and this Court denied certiorari, 423 U.S. 1066 (1976).[1]

2. Prior to his separate trial on the continuing criminal enterprise charge, petitioner, through newly appointed counsel, filed a motion to dismiss the indictment, claiming that trial on that charge was barred by his conviction of the lesser-included offense of conspiracy to distribute narcotics. The district court denied this motion. Petitioner was thereafter tried and convicted of engaging in a continuing criminal enterprise. He was sentenced to life imprisonment and fined $100,000, both to run consecutively to the 15-year sentence and $25,000 fine previously imposed in the conspiracy case. The court of appeals affirmed the conviction, 532 F.2d 1101 (7th Cir. 1976), holding that although a narcotics conspiracy is a lesser-included offense of conducting a continuing

---

[1] In that appeal, petitioner claimed that his trial counsel had been ineffective because of his failure to cross-examine a former client who testified as a government witness. Following the affirmance of their conspiracy convictions, petitioner and his co-defendants filed a motion under 28 U.S.C. 2255 for post-conviction relief, again claiming that they had been denied the effective assistance of counsel. The district court denied the motion, the court of appeals affirmed, 544 F.2d 523 (1976), and this Court again denied certiorari, 430 U.S. 935 (1977).

criminal enterprise, this Court's decision in *Iannelli* v. *United States*, 420 U.S. 770 (1975), created an exception to the double jeopardy rule in the case of complex statutory crimes, allowing for separate punishment on both the greater and lesser offenses if Congress so intended.

This Court granted certiorari. 429 U.S. 815 (1976). In a plurality opinion, four Members of the Court, while assuming that conspiracy under 21 U.S.C. 846 is a lesser-included offense of conducting a continuing criminal enterprise under 21 U.S.C. 848, concluded that the Double Jeopardy Clause nevertheless did not bar petitioner's trial for the latter offense because petitioner "was solely responsible for the successive prosecutions for the conspiracy offense and the continuing criminal-enterprise offense." 432 U.S. 137, 154 (1977). The plurality opinion also concluded, however, that because Congress did not intend to impose cumulative punishments under Sections 846 and 848, the district court had no power to impose on petitioner a fine greater than the maximum permitted by Section 848. 432 U.S. at 158; see also *id.* at 160 (opinion of Stevens, J.). Mr. Justice White concurred in the judgment to the extent it affirmed petitioner's conviction on the continuing criminal enterprise charge but dissented from the Court's conclusion that multiple punishments were not authorized.

3. On October 21, 1977, petitioner filed a motion under 28 U.S.C. 2255, claiming that he had not "waived" his protection against double jeopardy, that he had been denied effective assistance of counsel, and that the district court and the prosecutor erred in failing to advise him of the consequences of his opposition to the government's motion to try the con-

spiracy and continuing criminal enterprise charges together. The district court rejected these claims (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 5-7) that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney at the conspiracy trial was representing several clients with conflicting interests and because the trial court failed to advise him of the dangers of multiple representation and his right to separate counsel. In particular, petitioner claims that his attorney's decision to oppose the government's motion to consolidate the conspiracy and continuing criminal enterprise trials was made for the benefit of his co-defendants, and to petitioner's detriment. This contention is without merit.

Petitioner's reliance on *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), for his claim of ineffective assistance of counsel, is misplaced. The Court in *Holloway*, while recognizing that joint representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel" (435 U.S. at 482), held that the trial judge should have given greater weight to claims by defense counsel that his representation of several co-defendants created a conflict of interest. The Court pointed out that the possibility of a conflict had been raised by formal objections, motions, and defense counsel's representation (*id.* at 487). Defense counsel in the instant case made no such representations. This is not a case, therefore, where the trial court disregarded representations by defense counsel that he could not properly present his case because of a conflict of interest between his

clients. Nor, contrary to petitioner's apparent assertion (Pet. 5-6), was the district court constitutionally required to inquire, *sua sponte*, into the possibility of a conflict of interest in the joint representation of petitioner and his co-defendants at the conspiracy trial. *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980).[2] Therefore, because separate counsel was not requested at trial, petitioner must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Slip op. 13.

In the present case, petitioner has failed even to establish that his attorney was laboring under a conflict of interest, much less that such a conflict ad-

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[2] Petitioner argues that there is a conflict between the First and Seventh Circuits regarding the duty of a court *sua sponte* to make an inquiry of jointly represented defendants concerning conflicts of interest. However, the panel decision in *United States* v. *Martorano*, 610 F.2d 36 (1st Cir. 1979), which petitioner asserts is in conflict with the Seventh Circuit's decision in the instant case, was based on an exercise of the court's supervisory powers (*id.* at 41), not the Constitution. That decision, moreover, has been vacated by the First Circuit, sitting en banc. 620 F.2d 912 (1980). Under the en banc decision, reversal of a conviction is appropriate only where the defendant has been prejudiced by the multiple representation. As we show below (pages 5-7, *infra*), petitioner has failed to demonstrate that he was prejudiced by the multiple representation.

We further note that any disagreement among the circuits regarding the exercise of their supervisory powers to require a trial court to inquire about a possible conflict of interest will be resolved by Fed. R. Crim. P. 44(c), which became effective on Dec. 1, 1980. See Pub. L. No. 95-42, 93 Stat. 326. That ~~proposed~~ rule states that in cases of joint representation, "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." Review of the supervisory power question therefore is not warranted at the present time.

versely affected his lawyer's performance. The sole basis for petitioner's claim of conflict centers on his attorney's decision to oppose the government's motion to consolidate the conspiracy and continuing criminal enterprise trials. The record shows, however, that defense counsel's decision to oppose the consolidation motion sprang as much from concerns over petitioner's interests as from concerns over the interests of his co-defendants. As this Court stated (432 U.S. at 142 n.5 (citations omitted)):

> [T]he memorandum supporting the defendants' motion took pains to point out which objections to trial together were relevant to Jeffers alone. * * *. Indeed, the last argument before the conclusion stated:
>
> "It is likely that much of the evidence which will be presented in the conspiracy trial does not 'directly' inculpate the defendant, GARLAND JEFFERS, and would, therefore, be inadmissible against him in the 'continuing criminal enterprise' indictment unless a direct link could be established. All of the said overt acts would, however, be admissible, or at least arguably so, in the conspiracy trial. The prejudice to the defendant, JEFFERS, is therefore, imminent and clear."
>
> In addition to the arguments relating specifically to Jeffers, the memorandum contained a number of points designed to apply equally to all defendants. We see no reason to read it as implicitly excluding Jeffers.

Thus, to a significant degree, the interests of petitioner and his co-defendants were in concert, not in conflict. In any event, to the extent that petitioner's interests may have been in conflict with those of his

co-defendants because of the possible double jeopardy issue affecting petitioner's interests alone, petitioner has not shown that his lawyer's performance was adversely affected—*i.e.*, that the lawyer would have handled things differently but for the asserted conflict. *Cuyler* v. *Sullivan*, *supra*, slip op. 14-15.[3] As the court of appeals correctly stated (Pet. App. 4), "[w]here * * * an allegedly detrimental decision was made upon considerations which would have influenced even wholly independent counsel, the defendant has not been denied effective assistance of counsel simply because his attorney represented multiple defendants."[4]

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[3] Indeed, petitioner's lawyer appears to have been unaware of the double jeopardy issue affecting petitioner (432 U.S. at 159-160 (opinion of Stevens, J.)), and, therefore, of the possible divergence of interests. If the lawyer was unaware of the supposed conflict of interest, his performance could not have been adversely affected by it.

[4] Citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), petitioner claims (Pet. 7) that by opposing the government's consolidation motion, his attorney "could not thereby effect a waiver of [petitioner's] fundamental constitutional right against double jeopardy, without a record of his voluntary, knowing and intelligent acquiescence." This claim is similar to the claim made by respondent in *United States* v. *Dinitz*, 424 U.S. 600 (1976), that his mistrial motion constituted a waiver of his right not to be placed twice in jeopardy and that to be valid the waiver had to meet the standards set forth in *Johnson* v. *Zerbst*, *supra*. The Court disposed of this claim, stating (424 U.S. at 609 n.11):

> This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional pro-

Moreover, despite his contrary assertions (Pet. 6-7), petitioner can show no continuing prejudice caused by his attorney's decision to oppose the consolidation motion. Had his attorney acquiesced in the motion, petitioner would have been tried at a joint trial on charges of conspiracy and engaging in a continuing criminal enterprise. Because, as petitioner's subsequent trial and conviction made clear, the evidence was sufficient to support a conviction under 21 U.S.C. 848, it makes little difference, apart from petitioner's desire to escape punishment for that serious offense, whether that conviction resulted from a joint trial or from a subsequent trial on the continuing criminal enterprise charge alone. And, "[s]ince the Government had the right to try petitioner on the [continuing criminal enterprise indictment], the court had the power to sentence him to whatever penalty was authorized by that statute." 432 U.S. at 157. Further, petitioner does not suffer from multiple punishment resulting from the successive trials; he is serving only the sentence based on the continuing criminal enterprise conviction. *Id.* at 154-158; *id.* at 160 (opinion of Stevens, J.).

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hibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right.

We see no reason why the same principle would not apply in the present case.

It also is not clear what relief properly could be ordered if a conflict of interest were shown to have adversely affected the lawyer's performance. A retrial on the continuing criminal enterprise indictment would certainly not remedy the only injury petitioner can claim to have resulted from the supposed conflict—his being forced to go to trial a second time. Conversely, to dismiss the continuing criminal enterprise indictment because of the alleged conflict would, in effect, be to allow petitioner successfully to relitigate the double jeopardy claim this Court rejected in its prior review of petitioner's conviction, merely because petitioner has recast that claim in terms of ineffective assistance of counsel. Dismissal of the indictment would also unfairly allow petitioner permanently to avoid the substantial punishment imposed on the basis of an otherwise valid conviction on the continuing criminal enterprise charge even though neither the court nor the prosecution was responsible for the asserted constitutional violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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DECEMBER 1980

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